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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1192~~ 232

BROWN & ROOT, Inc., and
T. L. JAMES & CO., Inc.,
d/b/a Louisiana Bridge Co.,
Petitioners,

vs.

WESLEY E. ARCHER, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BEN H. POWELL, JR.
P. O. Box 3
Houston, Texas
HOWARD W. LENFANT
910 Richards Building
New Orleans, Louisiana
WILLIAM A. BROWN
702 Brown Building
Austin, Texas
JERRE S. WILLIAMS
P. O. Box 63
Austin, Texas

COUNSEL:

LENFANT & VILLERE
New Orleans, Louisiana
POWELL, RAUHUT, McGINNIS & REAVLEY

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May It Please the Court:

Petitioners, Brown & Root, Inc., and T. L. James & Co., Inc., d/b/a Louisiana Bridge Co., respectfully show the Court the following:

Opinion Below

The opinion of the Court of Appeals (App. 1) is reported at 241 F. 2d 663.

Jurisdiction

The judgment of the Court of Appeals (App. 2) was entered on February 21, 1957. A Motion for Rehearing was timely filed on March 14, 1957 and denied by minute order on April 3, 1957 (R 207). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

Petitioners and their employees constructed a causeway across Lake Pontchartrain near New Orleans. The causeway was something entirely new, not previously in existence to any degree. It did not become a part of any existing highway or other instrumentality already in existence and dedicated to commerce. It was a local project, locally financed without use of Federal funds and will not become part of the Federal Highway System. It was constructed of pre-stressed concrete component parts fabricated in a plant constructed on the shores of Lake Pontchartrain. Some of the employees were engaged solely in the construction of the new plant which was built as a permanent plant for the manufacture of various types of pre-stressed concrete products for sale to the public generally as well as for the manufacture of component parts for the causeway.

The questions presented are:

(1) Were employees engaged in construction of the Lake Pontchartrain Causeway "engaged in commerce" within the meaning of the Fair Labor

Standards Act so as to be entitled to overtime compensation?

(2) Were employees engaged in the original construction of the new factory "engaged in commerce" or "producing goods for commerce" within the meaning of the Fair Labor Standards Act so as to be entitled to overtime compensation?

Statute Involved

This case arises under the Fair Labor Standards Act of 1938, c 676, 52 Stat. 1060 as amended by the Fair Labor Standards Amendments of 1949, c 736, 63 Stat. 910, 20 U. S. C. 201, *et seq.*, the pertinent provisions of which are:

> Definitions:
>
> Sec. 3 [63 Stat. 911] As used in this Act—
>
> * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occu-

pation directly essential to the production thereof, in any State.

* * * *

Sec. 7 [63 Stat. 912]. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the produtcion of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Statement

Wesley E. Archer and other employees of Petitioner brought this action, and other employees similarly situated later intervened, to recover overtime compensation for work performed and paid for at the regular rates. Some of the employees involved were engaged in the actual construction of a new causeway across Lake Pontchartrain while others were engaged in the original construction of a new factory which upon completion was to produce a variety of pre-stressed concrete products including component parts for use in construction of the causeway.

The employees sought recovery on the claim that the employees engaged in constructing the causeway and the plant were "engaged in commerce" or the production of goods for commerce." The Trial Court entered judgment on Petitioners' Motion for Summary Judgment holding that the employment was

not covered by F.L.S.A. and denying recovery to the plaintiff employees. The Court of Appeals reversed this ruling, held that the employment was covered under F.L.S.A. and remanded for determination of damages and good faith.

The Lake Pontchartrain causeway is a 25 mile concrete bridge connecting the north shore and south shore of the lake to facilitate the expansion of the Greater New Orleans Metropolitan Area. (R 157) It is a local project by a local governmental agency financed with toll-revenue bonds and surplus funds from State Highway Bond No. 2, and no Federal Funds were employed (R 158). The bridge has not been and will not be designated a U. S. Highway and no existing highway has been or will be rerouted over the bridge (R 162). The causeway is a completely new facility never before in existence to any degree. The project was not the repair, improvement or redesign of any existing highway. The bridge is constructed of prefabricated, pre-stressed concrete components manufactured in a concrete products plant owned by Petitioners and situated on Lake Pontchartrain. This was an alternative method of construction chosen by Petitioners. Rather than construct a temporary facility to serve the causeway project alone, Petitioners decided to erect a permanent concrete products plant, at substantially increased investment, on a 40-acre tract, purchased in fee, provided additional land for expansion. The plant was intentionally designed in such a manner that concrete products of various types could be manufactured to meet a variety of specifications and sizes and uses. A location was selected

in the outskirts of the town of Mandeville, Louisiana, several miles east of the northern terminus of the Causeway. The plant on the shore of the lake was thus easily accessible by water to both the causeway project and other markets along the Gulf coast and inland waterways. The causeway project made feasible the construction of a permanent plant to enter the competition in a newly developing industry making pre-stressed concrete products. As contemplated, orders for a substantial volume of products in addition to the causeway components were received both during construction of the causeway and after its completion.

The concrete products plant is not now and has never been an integral part of the causeway. That plant is now owned and operated by Petitioners as a concrete products manufacturing plant while the causeway is owned and operated by its owners, the Greater New Orleans Expressway Commission. The concrete products plant was not producing goods during the time it was being constructed for that purpose. It is a new plant not previously in existence to any degree.

The Court of Appeals for the Fifth Circuit reversed and rendered, in part, holding that the employees engaged in construction of the new causeway were "engaged in commerce" in that they were constructing an improvement to an instrumentality of commerce (although the instrumentality improved was not identified). And that Court held an employee engaged in the construction of the concrete products plant was "engaged in commerce" because

"he was not building a plant—he was building a Causeway Bridge."

Reasons for Granting the Writ

The decision below should be reviewed not only because it conflicts with decisions of several other Courts of Appeals and departs from principles enunciated by this Court, but also because of its far reaching importance in the interpretation and enforcement of the Fair Labor Standards Act. The decision, in applying the Fair Labor Standards Act to the construction of a completely new highway and to the original construction of a completely new factory, is an abrupt and retroactive change from well-established principles. If allowed to stand, it will disturb the entire construction industry which, by its very nature, becomes committed, through competitive bidding, on the basis of existing law.

1. Ever since the enactment of the Fair Labor Standards Act of 1938, it has been the accepted interpretation of that statute that employees engaged in the original construction of new facilities later to be used in the production of goods for commerce or in commerce are not within the coverage of the law. This was also the original interpretation of the Wage and Hour Administrator, unchanged until this Court's decision in *Mitchell v. C. W. Vollmer & Co., Inc.* 349 U.S. 427 (1955) which is discussed later.

Wells v. Ford, Bacon and Davis, Inc., 145 F. 2d 240 (6th Cir. 1944)

Parham v. Austin Co., 158 F. 2d 566 (5th Cir. 1946)

Kelly v. Ford, Bacon and Davis, Inc., 162 F. 2d 555 (3rd Cir. 1947)

McDaniel v. Brown and Root, 172 F. 2d 466 (10th Cir. 1949)

Hartmaier v. Long, 238 S. W. 2d 332 (Mo. Sup. Ct. 1951) *cert. den.* 342 U. S. 833 (1951)

Wage and Hour Interpretative Bulletin No. 5, December 2. 1938

This Court recognized this principle by its holding in the case of *Murphey v. Reed*, 335 U.S. 865 (1948), a case involving construction of new facilities (a naval base at Gulfport, Miss.) later to be used in commerce. The question of coverage of employees engaged in the construction was disposed of by a brief *per curiam* opinion directing that the causes of action involving those workers be dismissed. The present case involves construction of facilities later to be used in commerce just as did *Murphey v. Reed*, and the decision of the Court of Appeals for the Fifth Circuit is directly in conflict with this Court's decision in that case.

The various Courts of Appeals have consistently held, until this case, that employees engaged in the construction of new highways are not covered by F.L.S.A. The holding by the Court of Appeals in this case is directly in conflict with the following cases in other circuits:

Crabb v. Welden Bros., 164 F. 2d 797 (8th Cir. 1947)

Koepfle v. Garavaglia, 200 F. 2d 191 (6th Cir. 1952)

Moss v. Gillioz Construction Co., 206 F. 2d 819 (10th Cir. 1953)

The Court of Appeals for the Fifth Circuit also, in an earlier case, held that employees engaged in constructing a new highway were not covered by the Fair Labor Standards Act. *Van Klaveren v. Killian-House Co.*, 201 F. 2d 510 (5th Cir. 1954).

2. The Court of Appeals for the Fifth Circuit based its decision in this case upon a misinterpretation of the holding of this Court in *Mitchell v. C. W. Vollmer & Co., Inc.*, 349 U.S. 427 (1955). The Court of Appeals apparently viewed the *Vollmer* decision as abandoning the established distinction of almost twenty years duration between construction of completely new facilities on the one hand and repair, maintenance and improvement of existing facilities on the other. The Court of Appeals recognized that the Lake Pontchartrain Causeway "represented something entirely new, not previously in existence to any degree, . . ." (241 F. 2d, at 664).

That the holding of the Court of Appeals was an erroneous interpretation of the *Vollmer* case is revealed by the careful wording of the opinion of the Supreme Court in the *Vollmer* case. The opinion stressed at several points that the construction there involved "the work of improving existing facilities of interstate commerce (the Gulf Intercoastal Waterway)" (349 U.S., at 430). This Court in the Vollmer opinion, distinguished its earlier holding in *Murphey v Reed* in a footnote by stating that that case involved "the building of a Navy base, not the improvement of a facility or instrumentality of interstate commerce." (349 U.S., at 430). This Court's discussion of *Raymond v. Chicago M. & St. P. R. Co.*, 243 U. S. 43, (decided under another stat-

ute) in the *Vollmer* case only goes so far as to hold that construction work which consists of redesign or improvement of an existing facility already dedicated to commerce is covered by F.S.L.A., whether the new construction is on or off the right-of-way, and whether it is a new tunnel on an existing railroad, a new lock on an existing canal, or a new bridge on an existing highway.

Vollmer dealt with one specific, existing, identifiable instrumentality of interstate commerce, namely, the Gulf Intracoastal Waterway, and this Court said, as the predicate for its holding: "The Gulf Intracoastal Waterway is an existing instrumentality of commerce. * * * It (the Algiers Lock) is part of the redesigning of an existing facility of interstate commerce." (349 U. S. 430). *Vollmer* did not find coverage because the Algiers Lock was an improvement of the entire system of navigable waterways in the United States. *Vollmer* did not hold work on the Algiers Lock to be covered by the FLSA because it linked with the Mississippi River, but, to the contrary, *Vollmer* found coverage because the Algiers Lock was an improvement which became a part of the Gulf Intracoastal Waterway which is an existing, identifiable instrumentality of interstate commerce. In *Vollmer* this Court likened construction of the new Algiers cut off segment of the Gulf Intracoastal Waterway to improving the existing parallel Harvey Canal segment of that waterway by dredging it deeper. In the case at bar there was no then-existing Pontchartrian causeway to be double-laned or looped or double-decked or otherwise improved, or redesigned or repaired.

In contrast to the misapplication of the *Vollmer* case by the Court of Appeals for the Fifth Circuit in this case, the Court of Appeals for the Eighth Circuit has interpreted the *Vollmer* holding in accordance with the precise wording of that opinion. In *Chambers Construction Company v. Mitchell*, 233 F. 2d 717 (8th Cir. 1956), Judge Vogel, writing for the Court, stated, "in our opinion, the Vollmer decision infers that the 'new construction rule' is not applicable to the *repair or replacement of existing facilities.* This is not a change in the law. It has been true ever since the F.L.S.A. was passed in 1938. (Ital. in original)" (p. 721.)

The erroneous decision by the Court of Appeals for the Fifth Circuit in the instant case was induced by the Administrator of the Wage and Hours Division in an Interpretative Bulletin dated July 17, 1956 in which the Supreme Court's desicion in the *Vollmer* case is misconstrued to extend coverage as follows:

> "Similarly, the construction of a new unit, such as a new airport [highways, turnpikes and similar systems] which is an addition to the entire interstate system of air transportation although not physically attached to any other unit, would, as a practical matter necessarily expand, promote, and facilitate the movement of interstate commerce over the airway system, and, consequently, would be subject to the Act. In such a situation the interstate system, although composed of physically separate local units, is, as a whole, the instrumentality of commerce which is improved."

This unduly broad interpretation of the *Vollmer* case by the Administrator was no doubt occasioned by the provisions of Sec. 9 of the Portal-to-Portal Act of 1947, 61 Stat. 89, 29 U. S. C. § 259, giving finality to administrative determinations declaring absence of coverage. Since this enactment, administrative interpretations have consistently encompassed the most speculative concepts of coverage to avoid extinguishing possible rights of individuals.

While expressly declining to accept this view and "press the full limits of 'naked' new construction," the Fifth Circuit in this case did base its decision on the fact that the entirely new highway "not previously in existence to any degree" would connect with and relieve the burden on U. S. Highways 190, 11, 90 and Airline Highway to Moisant International Airport. Obviously, the causeway will never become part of these highways nor part of Moisant International Airport and the Fifth Circuit is therefore following the Wage and Hour Administrator's erroneous view that the original construction of a completely new facility which will to any degree *affect* other facilities of commerce, is covered by F.L.S.A.

This Court in *Vollmer* did not hold that construction which *affects* commerce is covered, but only that construction is covered if it constitutes an improvement of an existing facility already dedicated to commerce. It has long been established that F.L.S.A. does not apply to activities which merely *affect* commerce. In *Noonan v. Fruco Const. Co.*, 140 F. 2d 633, 634, the Eighth Circuit said.

> "The legislative history of the Act makes it clear that Congress did not intend to give the

> phrase 'engaged in commerce' a coverage which would reach out and encompass any employment activity which might 'affect commerce' in the sense that the phrase has been used in other acts."

Petitioner asserts that the opinion of this Court in the *Vollmer* case speaks clearly for itself and that the interpretation placed upon it by the Court of Apeals for the Eighth Circuit is the correct one. If the decision of the Court of Appeals for the Fifth Circuit in this case is allowed to stand, every highway and byway in the United States will be treated as part of a single facility or instrumentality of interstate commerce. In the words of the Court of Appeals for the Sixth Circuit, *Koepfle v. Garavaglia*, 200 F. 2d 191, 193 (6th Cir. 1952):

> "If this is the applicable rule, every passable country road is within the same classification for practically every road, however isolated and however local, at some point carries passengers or freight to or from some interstate destination. This sweeping contention is not sustained by the sound and applicable law."

There is a ready line of demarcation between the repair, maintenance and improvement of existing highways on the one hand, and the construction of new highways on the other. But if the construction of this causeway is held to be covered, there is no line of demarcation to withdraw from Fair Labor Standards Act coverage the construction of any road capable of carrying motorized vehicles anywhere in the United States. Such an interpretation

would constitute a radical departure from the established application of the Fair Labor Standards Act which has stood for almost twenty years. This application has also been approved by Congress through its failure to make any change in the established rule when the statute was completely reworked by amendment in 1949.

3. In this case, the Court of Appeals for the Fifth Circuit failed to recognize and apply the doctrine of this Court that it will not change an established interpretation of a statute but will leave such changes to the Congress. This well-founded and well-considered doctrine has been applied in cases involving the Fair Labor Standards Act as well as in innumerable other fields. In *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17 (1947) this Court was asked to overturn its interpretation in *Walling v. A. H. Belo Corp.*, 316 U. S. 624 (1942) The *Halliburton* case involved a "regular rate" for an irregular work week established by contract in the form of the Belo rule. However, the rate was establised in such a way that an employee would have had to work 84 hours a week to be entitled to any overtime pay under the Fair Labor Standards Act. In following the Belo rule, this Court said:

> "Moreover, our holding in Belo, has been a rule of decision in this Court for five years, and recognized as such on each appropriate occasion. Knowing of the Belo decision, the Congress has permitted § 7 (a) to stand unmodified and the courts have applied it as so construed. Employers and employees (including those involved in this case) have regulated their affairs on the faith of it.

> "Even if we doubted the wisdom of the Belo decision as an original proposition, we should not be inclined to depart from it at this time." (331 U. S. at 25)

In *Alstate Construction Co., v. Durkin*, 345 U. S. 13 (1953) this Court stressed that the failure of Congress to amend the F.L.S.A. to modify an established but controversial interpretation when it completely re-worked the Act in the 1949 Amendments, was strong indication that the established interpretation is in accordance with Congressional intent.

This Court has followed the same policy in other areas. Just recently, in *Guss v. Utah Labor Relations Board*, U.S. , 77 Sup. Ct. 598 (1957), it refused to abandon its earlier interpretation of the National Labor Relations Act (e.g. *Garner v. Teamsters Union*, 346 U. S. 485 (1953)) and allow the states to apply their local labor law to businesses covered by the federal statute but outside the jurisdictional standards promulgated by the National Labor Relations Board. In so holding, this Court concedes that its decision might create a vast no-man's land. Other statements of this principle, particularly applicable to this case, are found in *Apex Hosiery Co., v. Leader*, 310 U. S. 469, 488 (1940), *Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953) and *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 379 (1952).

Congress completely re-worked the Fair Labor Standards Act in the 1949 Amendments and did not see fit to make a change in the established exclusion of the original construction of new facilities. What it did do in connection with coverage is most reveal-

ing with reference to this question. Under the coverage interpretations before the 1949 Amendmnts, it was established by decisions of this Court that the "Production for commerce" coverage was quite broad because of the definition of "produced" contained in Sec. 203(j) of the statute. *Kirschbaum v. Walling*, 316 U.S. 517 (1942). Since there is no similar broadening definition concerning the "engaged in commerce" coverage standard, this Court recognized that coverage did not extend so broadly under this latter standard. *McLeod v. Threlkeld*, 319 U.S. 491 (1943). The broad application of the "production for commerce" coverage and narrow application of the "engaged in commerce" coverage has continued through the entire history of the Fair Labor Standards Act. In fact, this Court in the *Vollmer* case cited and relied upon *McLeod v. Threlkeld* in defiining the present limited scope of the "engaged in commerce" coverage. (394 U.S. at 429).

With this distinction well-established and firmly in mind, Congress in the 1949 Amendments left the narrow coverage of "engaged in commerce" untouched but changed the wording of the definition involved in the "production for commerce" standard to *narrow* the coverage, not broaden it. The "production for commerce" standard was narrowed by Congress although it had already been established that new construction was *not* covered even under this broader standard of coverage. This history of the interpretation of the statute and the 1949 Amendments reveals clearly that up to the present time it is Congress' intent that employees engagd in new construction, even though the factory or

highway being constructed ultimately will be used in production for commerce or in commerce, or will affect commerce, are not covered by the Fair Labor Standards Act.

A particular reason why the Court of Appeals for the Fifth Circuit should not have altered the established statutory interpretation in this case is shown by the facts here involved. Petitioner constructed the Lake Pontchartrain Causeway under a contract obtained on competitive bid, the bid being very properly based upon the established new construction doctrine, confirmed by Congressional failure to alter that doctrine when engaging in extensive amendments to the law in 1949. The decision of the Court of Appeals by retroactively changing this well-established interpretation will, unless corrected by this Court, place an unreasonable and unjustified financial burden upon this petitioner and other contractors similarly situated.

4. Even if the employees engaged in constructing the causeway are found to have been engaged in commerce, the Court of Appeals for the Fifth Circuit was clearly wrong in holding employees engaged in the original construction of the permanent plant to produce pre-stressed concrete products to be covered by F.S.L.A.

This portion of the decision of the Fifth Circuit is in conflict with the following applicable decision of this Court, of the Court of Appeals for the Fifth Circuit, and of other Courts of Appeals:

Murphey v. Reed, 335 U.S. 865
McDaniel v. Brown & Root, Inc. (10th Cir) 172 F. 2d 466

Tobin v. Pennington Winter Construction Co. (10th Cir) 198 F. 2d 334

Kelly v. Ford, Bacon & Davis (3rd Cir) 162 F. 2d 555

Noonan v. Fruco Constr. Co. (8th Cir) 140 F. 2d 633

Parham v. Austin Co. (5th Cir) 157 F. 2d 566

Without discussing or undertaking to distinguish these cases, the Court of Appeals merely held that the construction of the concrete products plant was in legal effect the construction of the causeway which was made from pre-stressed concrete parts to be produced in the concrete products plant after its completion. The opinion refers to the plant as a "Field Plant" and concludes that it is an integral part of the causeway in the same sense as would be a temporary, construction toolhouse built on the right-of-way. Actually, the concrete products plant is a permanent plant situated on a 40 acre tract purchased in fee in Mandeville, Louisiana rather than located temporarily on the available right-of-way provided by the causeway owner. It was constructed at substantial additional cost as a permanent, rather than temporary, plant to serve the rapidly growing general market for pre-stressed concrete products. (R 158-159). The Louisiana State Board of Commerce and Industry granted a new-industry tax exemption recognizing it as a permanent plant to be continued in operation long after the causeway was completed. (R. 160). During construction of the causeway and prior to its completion, 5 purchase orders had been received from customers unrelated to the causeway for other

concrete products for use in off-shore drilling operations to the extent of $100,000.00. (R 160). Since that time additional sales had been made through March 1957 as follows:[1]

Louisiana Power & Light Co.—Pile and caps as foundations for 75' high steel transmission towers on a 46 mile transmission line across Lake Pontchartrian	$1,100,000.00
Florida Highway Commission—piling	400,000.00
Illinois Turnpike Commission—piling	125,000.00
Louisiana Highway Commission—deck sections, caps and piling for bridge across Sabine Lake, Louisiana	400,000.00
Oil companies—Additional orders for piling for offshore platforms and tank battery platforms above those covered in five purchas orders referred to above	125,000.00
	$2,150,000.00

Thus, the total "Non-causeway" orders through March 1957 amounted to $2,250,000.00.

The Court of Appeals reasoned that the original construction of the plant was an integral part of the construction of the causeway because (a) the products of this plant, needed for the causeway, were not previously obtainable on the open market (b) the plant operation was complex, specialized, involved

[1] The post-completion sales, like most of the facts recited in the opinion of the Court of Appeals, appeared in magazine and newspaper articles and do not appear in the record. At the time of oral argument the Assistant Solicitor of the U.S. Department of Labor furnished magazines to the Court without objection.

great weights and pressures, and its products were vital to construction of the causeway (c) the plant location was selected for accessibility to the causeway project by water (d) the bridge owner's engineer inspected the plant operation after completion, and (e) no change in plant design which would affect the quality of the bridge sections was allowed without the approval of the owner's engineers. In giving such legal effect to these facts, the holding in this case is in direct conflict with the previously cited cases.

In *Noonan v. Fruco Construction Co.*, 140 F 2d 633 the Eighth Circuit held that the fact that the plant was of special design for the manufacture of munitions to be sent into interstate commerce did not have the legal effect of making the construction of the plant "necessary" to the production of goods for commerce within the coverage of the F.S.L.A. "although the plant's so-called 'special design' may expedite the production." The reliance by the Court of Appeals for the Fifth Circuit in this case upon the fact that the plant was especially designed to build pre-stressed concrete products suitable as component parts of the causeway among other products, as a basis for its finding of coverage under F.L.S.A., is in direct conflict with the decision of the Eighth Circuit in the *Noonan case.*

The Third Circuit's holding in *Kelly v. Ford, Bacon & Davis*, 162 F. 2d 555, involved a plant being constructed to manufacture aircraft engines for commerce. That Court held that the construction work was not covered by the F.L.S.A. despite the fact that frequent changes in design of the plant were made by the owner's engineers pending construc-

tion. The very nature of the product involved (aircraft engines) suggests that the products of that new plant were essential to construction of aircraft, required precision work to fine tolerances and required the exercise of a high degree of engineering talent. The reliance by the Court of Appeals for the Ffith Circuit in this case upon the enormity of the pre-stressed concrete bridge sections and the need for inspection and engineering approval of any changes in the plant, as a basis for finding coverage under F.L.S.A., is in direct conflict with the holding of the Third Circuit in the *Ford, Bacon & Davis* case.

No other source of supply on the open market existed for the aircraft engines to be manufactured in the plant under construction in the *Ford, Bacon & Davis* case, or for the bombers to be built in the plant under construction in *Parham v. Austin Co.* 158 F. 2d 566 previously decided by the Court of Appeals for the Fifth Circuit. Indeed, most plants are built because the commodity to be produced therein is in short supply or because the commodity is newly developed and has never before been produced. Reliance upon the novelty of the product and the lack of an existing open market supply, as a basis for holding the original construction of the concrete products plant to be, in effect, construction of the causeway, is in direct conflict with the holding of the Third Circuit in the *Ford, Bacon & Davis* case and the prior holding of the Fifth Circuit in the

Austin Co. case. In both of those cases, the Courts refused to hold that the original construction of the plant is, in effect, construction of the aircraft engines, much less construction of the bombers.

Frequently, in fact usually under conditions now existing, a large plant conceived and built for production of goods for the general market is rendered financially feasible by virtue of one large initial sale of its products. This is particularly true of the war plants such as were involved in the *Ford*, *Bacon Davis*, the *Austin Co.*, and the *Fruco Construction Co.* cases. And plants are usually located for ready accessibility to their initial customers or prospective customers. Accessibility of the plant to the market is a vital consideration in the selection of a site for any new plant. Undoubtedly it was a dominant factor, although not discussed, in each of the cases cited. The factor of accessibility was not so dominant in this case as to induce construction of a temporary plant directly on the right of way site available from the owner under the causeway contract, in preference to the 40-acre tract in the nearby town of Mandeville which location was close enough to the causeway project to serve it effectively but still provide ready access by water to the hemispheric market for the varied concrete products of the plant.

The distinction heretofore firmly established is clear, simple of application, and reasonable. A construction job facility is temporary only and is referable solely to the construction project being per-

formed and is on the job site furnished by the owner. Such a facility is unquestionably part of the construction project whether it be a job office, shack, aggregate hopper, or vehicle lubricating pit. But if, as here, the plant being constructed is permanent in design and is contemplated for use in production of products for the general market (even a highly specialized market) after the major portion of the investment has bèn recouped through furnishing products as components for the causeway construction project, the original construction of the concrete products plants cannot reasonably be said to constitute construction of the causeway. To depart from this standard, as the Fifth Circuit does in this case, is to abolish all limitations and to extend coverage to all construction of new plants intended for the production of goods for commerce or for use in instrumentalities of commerce.

If this decision is allowed to stand, two sweeping changes will have been made retroactively in the Fair Labor Standards Act by Judicial interpretation, in spite of clear indication that the Congressional policy is otherwise.

Conclusion

WHEREFORE, these petitioners respectfully pray the Supreme Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth

Circuit to the end that the Supreme Court may review the judgment of that Court in this action.

Respectfully submitted,

BEN H. POWELL, JR.
P. O. Box 3
Houston, Texas

HOWARD W. LENFANT
910 Richards Building
New Orleans, Louisiana

WILLIAM A. BROWN
702 Brown Building
Austin, Texas

JERRE S. WILLIAMS
P. O. Box 63
Austin, Texas

OF COUNSEL:

LENFANT & VILLERE
New Orleans, Louisiana

POWELL, RAUHUT, McGINNIS & REAVLEY
Austin, Texas

July, 1957

APPENDIX 1.

In the

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 16289

WESLEY E. ARCHER, ET AL,
Appellants,

versus

BROWN & ROOT, Inc., and
T. L. JAMES & CO., Inc.,
d/b/a Louisiana Bridge Co.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
(February 21, 1957.)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

BROWN, Circuit Judge: The District Court, sustaining the Employer's motion for summary judgment, held that persons working on (a) the construction of the Lake Pontchartrain Causeway, (b) the production of materials for use in its construction, and (c) the construction of the field plant for the production of materials essential to construction of the Causeway, were not "engaged in commerce or in the production of goods for commerce * * * ," 29 USCA 201, 206, and hence were not entitled to recovery of overtime and statutory penal-

ties. A determination of non-coverage as to (a) is decisive, for (b) and (c) fall automatically with it. If coverage exists as to (a), the Employer virtually concedes (b), but vigorously asserts that (c) is still not within the Act.

(a) Construction of the Causeway

Since the Causeway represented something entirely new, not previously in existence to any degree, the status of coverage depends, not on the nature of the physical operations performed by the workers, but on the nature of this project as a facility of interstate commerce. The workers, joined here (as *amicus curiae)* by the Secretary of Labor as a formidable ally, claim that *Mitchell v. Vollmer & Co.*, 349 U.S. 427, 99 L.Ed. 1196, means not only what it says, but what the Court later said it said, "* * * This Court recently rejected the 'new construction' doctrine in determining whether an employee is 'engaged in commerce' within the meaning of a like provision in the Fair Labor Standards Act * * * ," *Southern Pacific Co. v. Gileo*, 351 U. S. 493, 500, 100 L. Ed. 1357, 1365, so that "new construction" is now altogether insignificant. The Employer insists that *Gileo* is dicta and that *Vollmer* merely applied, without extension, the prior law, *Chambers Construction Co. v. Mitchell*, 8 Cir., 233 F. 2d 717, 721, Wecht, Wage-Hour Law—Coverage (1951) at page 84, that a piece of new construction was covered if, as a repair, modification, extension or improvement of an *existing* facility, it had a vital relationship to the functioning of such an instrumentality or

facility. So read, *Vollmer* became no pronuoncement of a new principle, but simply a reversal of our decision, 214 F. 2d 132, for error in that particlar case. The path, likely somewhere between these extremes, we need not mark with precision. For here, as in *Mitchell v. Hodges Contracting Co.*, 5 Cir., 238 F. 2d 380, we decline, as unnecessary and unwise, the invitation to press the full limits of "naked" new construction. under *Vollmer*.

Lake Pontchartrain (approximately 45 miles long east to west, and 25 miles north to south) is so situated with respect to the trade and commerce area of metropolitan New Orleans, located mid-way on the south side, that traffic from a northerly and northeastly direction has to follow a circuitous route around the south side of the Lake. With the spectacular commercial expansion of this area, the establishment of new business, the construction of new extensive industrial plants and the natural influx of people, the resultant traffic congestion presented a problem of great concern to the people of this area and Louisiana. To eliminate the circuitous route, to relieve already overburdened highways on the south side and to facilitate the flow of traffic in and out of New Orleans, the Lake Pontchartrain Causeway was conceived. By acts of the legislature, Act 90, Louisiana Legislature 1952 and the organic authority of the 1952 Constitutional Amendments, amending Subsection (g), Section 22, Article VI of the Constitution of Louisiana, the Parishes of Jefferson and St. Tammany and the specially constituted Greater New Orleans Expressway Commission, their operating agency were authorized to build this

Expressway and to finance its construction by 40-year Revenue Bonds from toll charges supplemented by substantial annual amounts from State Highway Fund No. 2 which came from all motor vehicle registration fees collected by the six parishes contiguous to Lake Pontchartrain. From the interim payments into Fund No. 2, a reserve of $5,000,000.00 had actually accumulated when the construction contract was let. Out of this reserve, the State Highway Department was obligated to construct access approach roads to the Expressway. The Expressway was declared to be " a part of the State Highway System * * * ," Act 90, *supra;* 1952 Constituitonal Amendment, *supra.*

After extensive engineering and traffic studies, the Expressway was designed—as a production indigenous to this dynamic area almost had to be—as the world's longest bridge, to run 25 miles across the Lake, its southern end in the western part of metropolitan New Orleans just inside the Jefferson Parish line as required, and the opposite end, almost due north, just west of Mandeville, Louisiana in St. Tammany Parish. To finance the contract cost of $30,677,210.00 for the Bridge and its main approaches and the further estimated cost of $2,700,000.00 for extensions beyond the south terminus, plus all other direct costs aggregating $37,102,513.00, tax-exempt Revenue Bonds totaling $46,000,000.00 were issued and sold to investors.

The project, as adopted and officially represented by the contracting Parishes, made the Expressway something far beyond a highway of local value and convenience. For the contract expressly included the

construction of three separate four-lane approach roads tying the north end of the Causeway into Highway U. S. 190 to give ready access to all traffic to and from points west, east and north on this arterial interstate highway. U. S. 190 is one of the principal arteries from East Texas through middle South Louisiana and Baton Rouge terminating in U. S. 11, a north-south highway and U. S. 90, an east-west artery, near the extreme easterly end of the Lake. These aproaches provide access also to a network of State designated highways leading by several routes directly into Mississippi to connect there with similar State and Federal arteries. On the south end, the project called for the Expressway to run 3.2 miles on land to specifically tie into Airline Highway (U. S. 61 and 64), an important artery leading from Arkansas and Mississippi down through Baton Rouge, past Moisant International Airport, into the heart of New Orleans, connecting there with U. S. 90 to the east. And, as a part of the related projects to be financed from the accumulated reserve of $5,000,000.00 in State Fund No. 2, the State Highway Department became obligated to extend a four-lane super highway southward beyond Airline Highway to connect, by suitable traffic interchanges, with Jefferson Highway, U. S. 90, the main transcontinental east-west artery through Texas, South Louisiana, across the Huey P. Lang Mississippi River Bridge, through New Orleans and to the Eastern Seaboard beyond.

The elaborate and expensive traffic interchange plans to connect the Expressway into these busy nationwide arteries was, of course, no accidental co-

incidence. It was the very heart of a plan without which the project would have been a colossal boondoggling waste, would have failed in its intended purpose to alleviate increasing traffic chaos and, most likely, would not have attracted a single dollar of investor's capital. If the Expressway was to be a useful, efficient carrier of traffic, if it was to be feasible from an economic and financing point of view, it had to be a direct link in the established network of interstate arteries made up both of federally designated highways and principal state highways.

The purpose that the Expressway, on completion, would be such a link is established beyond contradiction. That it was to be sponsored by State and Parish governments in recognition of responsibilities resting upon them reasonably to supply the public facilities needed for the movement of today's flood of local, state, interstate and foreign commerce, and was to be paid for by users, without either of them making the common trek to Washington for the beguiling grant of federal aid, detracts not a whit from its status as an interstate facility. Public funds, State or Federal, are not essential to the creation of instrumentalities of interstate commerce, cf. *Overstreet v. North Shore Corp.*, 318 U.S. 125, 87 L.Ed. 656; *Walling v. McCrady Construction Co.*, D. C. Penn., 60 F. Supp. 243, affd. 3 Cir., 156 F. 2d 932, Cert. den. 329 U.S. 785, 91 L.Ed. 673.

The purpose was thus clear, and the expectation that it would be a useful improvement of interstate facilities was certainly equally well-founded. Whether, and to what extent, entirely *new* traffic

might be generated (i.e., traffic not previously using any of the other routes to and from New Orleans) was perhaps uncertain in the expert opinions of the traffic consultants. But there was none either as to the probable minimum volume of use by accepted classifiactions of passenger, truck and bus traffic, or the substantial savings in time, mileage and money on typical journeys to and from the New Orleans area and points to the north, northeast and east which would attract a considerable portion of existing traffic. Equally uncontradicted is the position of New Orleans, one of the Nation's most efficient and thriving gateways to National and International trade. From the confluence of the vast interlacing inland waterways, a deepwater seaport with rebounding facilities, a system of major railroads fanning out in all directions, and a network of connecting State and Federal highways, New Orleans has become a reminder that the American idea of dual sovereignty pervades our economic as well as political life. For to New Orleans, interstate and foreign commerce, vital to the economic prosperity of the area, is actively cultivated and needed facilities are established or sought. Highways leading into it are esssential adjuncts whether they carry goods from other states or the rich harvest of Louisiana's agricultural and industrial produce destined for movement beyond.

Whether, prior to *Vollmer*, this project, physically isolated by considerable distance from the established facilities of which it was to be a functional part, would have been considered an improvement of an existing facility may have been open to con-

siderable doubt, especially as to those within the geographical reach of our pronouncements, see *Van Klaveren v. Killian-House Co.*, 5 Cir., 210 F. 2d 510 (deemed overruled by the dissenters in *Vollmer*). But *Vollmer* does, we think, at least do this much: in the emphasis to be given "practical considerations" if it is plain that the project, when completed, is intended to and will serve as an important, definite adidtion to, or improvement of, existing, identifiable instrumentalities and thus facilitate the flow of commerce, whether by saving of time, or distance, elmination of costly delays or obstacles, or by an infinite variety of other causes, then mere physical isolation, separation of the project from the point or points of its ultimate connection with existing facilities or the necessity for a future connection will not be decisive.

That it would be a link in the existing interstate system was indispensable to the planning, execution, financing and operation of this Expressway. Thus it was, within the teaching of *Vollmer*, "so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity * * *," 349 U.S. at 429, 99 L.Ed. at 1200.

Those working on the actual construction of it were, then under the Act.

(b) Production of Materials used in Construction of Causeway

Since, as we now hold, building the Causeway was Commerce, it follows, with no real opposition

from the Employer, that workers producing materials (cement, concrete, piling, precast slabs, etc.,) which went directly into its construction were engaged in "producing goods for commerce," *Allstate Construction Co. v. Durkin*, 345 U.S. 13, 97 L.Ed. 745; *Thomas v. Hempt Bros.*, 345 U.S. 19, 97 L.Ed. 751; *Mitchell v. Raines*, 5 Cir., 238 F. 2d 186, 188.

(c) Construction of the Field Plant

Starting with the premise that ordinarily the construction of a plant which, when completed, is expected to manufacture goods a part of which are intended to move in interstate commerce, will not make such construction "commerce", *Parham v. Austin Co.*, 5 Cir. 158 F. 2d 566; *McDaniel v. Brown & Root, Inc.*, 10 Cir. 172 F. 2d 466; *Kelly v. Ford, Bacon & Davis*, 3 Cir., 162 F. 2d 555; cf. *Tobin v. Pennington-Winter Construction Co.*, 10 Cir., 198 F. 2d 334, cert. den. 345, U. S. 915, 97 L. Ed. 1349, and *Murphey v. Reed*, 335 U. S. 865, 93 L. Ed. 410, especially in light of footnote 2 in *Mitchell v. Vollmer, supra;* and see, Wage and Hour Division Interpretative Bullentin No. 5 set forth dissent *Mitchell v. Vollmer & Co.*, 349 U. S. 427 at 433, 99 L. Ed. 1196 at 1202, the Employer insists that the workers (comprising, we understand, the majority of claimants here) who built the Lakeshore Plant to fabricate and produce materials needed and used in the Causeway construction were not covered.

We think that the workers were covered, not because such secondary, new construction comes automatically under the *Vollmer* tent for we decline, as before, *Mitchell v. Hodges Contracting Company*, 5

Cir., 238 F. 2d 380, 384, the Secretary of Labor's entreaty to find in *Vollmer* the complete annihilation of all jurisprudence concerning the status of plants under initial construction merely because the term "new construction" was used or was involved. Rather, it is because, having found that those in group (a) building the Bridge were covered, we hold here that those in (c) were, in effect, also building the Bridge.

This depends not on legal principles, but on uncontradicted facts concerning the nature of this project from an engineering and construction point of view. This was no simple case of a contractor deciding it was to his interest to erect a job site plant to produce materials which he might otherwise obtain on open market purchase or by subcontract. Here, there was a complex, integrated operation testing, but not overtaxing, the professional skill and ingenuity of those contractors (Brown & Root, Inc., and T. L. James & Co., Inc., as joint ventures under the name of Louisiana Bridge Co.) as they laid out and executed the plan of operations for the building of this Causeway.

For not only was it long—if not the longest—its basic design compelled a substantial and elaborate plant at lake side without which this type of Bridge could not be built. This unique design was the use of prestressed concrete. This special technique, apparently a recent postwar development carried out under license from patent owners, required the centrifugal casting of cylindrical concrete pilings combined into required rigid lengths by post-stressing and the monolithic casting of prestressed slab deck

sections each weighing about 200 tons, approximately 56 feet in length and 33 feet in width.

The contract specifications required that the deck slab and its seven integral longitudinal beams be cast as a monolith, and that before the concrete was poured into the retractable forms, a series of 25 wire cables strung through the spaces in which the girder beams would be cast, were subjected, by special hydraulic jacks, to a tension pull of 160,000 psi. With the wires under the prestressing tension, the concrete was poured, and after the cast monolithic slab section was steam cured and allowed to harden to a specified standard, the ends of the wires to backing bars and jacks were cut. Thus the section, when hardened, was reinforced by steel stressed to 160,000 psi.

The contract permitted, and for efficient operations the plant was set up after being approved by the owner's Project Engineer, so that eight of the deck slabs would be cast in one continuous operation. This required that facilities be available to permit the stringing and prestressing of the wires for each of the seven beams for the whole length of eight slabs (8x56=448 feet), plus the space between the ends of each, and the pouring of concrete in the sequence prescribed. After the concrete hardened to the Engineer's satisfaction, each slab was required to be moved, as a unit, onto a barge for transportation to the Bridge site in the Lake for hoisting into its resting place on the post-stressed, concrete, cylindrical piles.

Equally tremendous was the operation of casting the concrete piling (54" in diameter, approximately 16' in usual length, with a 4" wall). This included

an assembly line preparation of reinforcing wire "cages", the insertion of removable rubber hoses to make the necessary holes, for post-stressing wires, the placement of them in cylindrical form, the centrifugal pouring of cement while the forms were horizontal, the steam curing and hardening of the concrete, and the preparation of piles sections for joinder by post-stressed wires. Several sections were butted end to end and steel wire cables run through the 12 holes cast around the circumference and, by an operation similar to the prestressed deck slabs, the wires were placed under a tension of 160,000 psi. While under this tension, a grouting cement was forced under pressure into the holes around the stressed wires and allowed to harden. When finally hardened, the wires were cut and the effect of the grout was to hold pile sections together under a tension of 160,000 psi. When completed these, too, were lifted by crane onto barges for movement to the Bridge site where they were driven into the bed of the Lake.

In addition, cast with the reinforcing steel in the traditional way, but without pre or post-stress, were the solid concrete caps approximately 3-1/2 feet by 3 feet by 32 feet on which, placed on top of the piles, the beams of the deck slab rested.

Since over 2,200 deck slabs and 4,400 full length piling were needed for the 24 miles of over-the-water roadway, the production of these, considering their size, weight, and nature, the long during and hardening time, the exacting standards for the concrete hardening while the reinforcing steel wires were prestressed, had to be set up on a well-designed, integrated assembly line.

To produce and handle these huge, cumbersome casts as the contract specified, the plant had, of course, to be gigantic in size and cost. The details are unimportant, but we are informed that the plant site was established on a 40-acre shoreside tract purchased by the contractor near Mandeville. A channel for access to and from the Lake and a slip for handling barges was dredged, the spoil pumped onto the swampy site to raise its elevation over six feet, and hundreds of piling driven on which to construct concrete surfaces or to bear the heavy assembly line equipment for casting. Two main casting assembly lines, one for two sections of eight deck slabs each, the other for one such section and casting the caps were constructed with necessary rails for the movement of the concrete spreaders, screeders and finishers, the shifting of curing sheds and the movement of a twin rail overhead 200-ton gantry crane as it hoisted a finished slab from its form and carried it to a point over a barge moored in the slip on which it was lowered for transport to the Bridge site.

So vital was the actual process of making the stressed casts, that the contract required the attendence of the Engineer personally to observe the stressing and releasing of the wires and, after approval and installation of the contractor's proposed plant layout and sequence scheme for stressing, it forbade any changes without the Engineer's express premission.

Whether, as claimed by the Employer, it chose to install a plant designed and equipped as a permanent plant for future use after completion of the Bridge project, there can be no question whatsoever that this plant, or a similar lakeside one, was indis-

pensable to performance of this construction contract. The only reason it was built where it was and when it was, was because of this contract. It was an integral part of the whole project, *Bennett v. Loftis Co.*, 4 Cir., 167 F. 2d 286 at 288; *Mitchell v. Brown*, 8 Cir., 224 F. 2d 359 at 365, cert. den. 350 U. S. 875, 100 L.Ed. 773, and not the mere creation of a manufacturing plant from which goods would be shipped for later consumption. The decision to so build it that it would be no salvage loss and would have future utility attests only to the characteristic skill, efficiency, imaginative foresight, resourcefulness and enterprising courage of these two contractors.

Had the Bridge been a conventional one constructing a superintendent's job site office, a watchman's shack, an aggregate hopper, or a vehicle lubricating pit would each have been a part of the main job even though preliminary to it and unseen or nonexistent in the final product. The immensity of this project, the complications brought on by its size, the millions of dollars expended, or the unique engineering methods prescribed does not alter the fact that, as a workman drove a pile on which to place the rail to rest the gantry crane to hoist the concrete deck slab, he was not building a plant—he was building a Causeway Bridge.

These workers in group (c) were therefore covered. And, for these reasons in addition to those discussed above, workers in group (b) were also covered.

Good Faith Defense

The summary judgment for the Employer must be reversed and here rendered for the plaintiffs and Interveners on coverage as to groups (a), (b) and (c). But there is yet left undertermined the amount of overtime due and whether, as alleged, the Employer, under Section 11, 29 USCA 260, shall be relieved of penalties because failure to pay, while mistaken, was a good faith misunderstanding of the law. The cause must therefore be remanded for such determinations.

REVERSED AND RENDERED IN PART. REVERSED AND REMANDED IN PART.

APPENDIX 2.

Judgment

Extract for the Minutes of February 21, 1957

WESLEY E. ARCHER, ET AL.,

versus

No. 16289

BROWN & ROOT, Inc., and
T. L. JAMES & CO., Inc.,
d/b/a Louisiana Bridge Co.

The cause came on to be heard on the transcript of the record from the United States District Court of the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and rendered in part, and reversed and remanded in part, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Brown & Root, Inc., and T. L. James & Co., Inc., d/b/a Louisiana Bridge Co., be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Office - Supreme Court
FILED
JUL 2 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted]232

BROWN & ROOT, Inc., and
T. L. JAMES & CO., Inc.,
d/b/a Louisiana Bridge Co.,
Petitioners,

versus

WESLEY E. ARCHER, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

HORACE R. ALEXIUS, JR.
P. O. Box 142
Covington, Louisiana

OF COUNSEL:

GORDON GOODBEE
Covington, Louisiana

McDOUGALL & RODRIGUE
Covington, Louisiana

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 1132

BROWN & ROOT, Inc., and
T. L. JAMES & CO., Inc.,
d/b/a Louisiana Bridge Co.,
Petitioners,

versus

WESLEY E. ARCHER, ET AL.,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals, Fifth Circuit, is reported at 241 F. 2d 663.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1957. A Motion for Rehearing was timely filed

on March 14, 1957 and denied by minute order on April 3, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether employees engaged in construction of the new Lake Pontchartrain bridge and causeway project in New Orleans (including the construction of an adjacent plant for the fabrication of the necessary materials and parts of the bridge) — a project designed as an important improvement of and link in the existing interstate highway network — are engaged "in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 63 Stat. 910, 29 U.S.C. 201, et seq.

STATEMENT

Respondent respectfully refers the Court to the facts as stated in the opinion of the Court of Appeals, which is an adequate and more accurate statement than that of petitioners.

REASONS FOR NOT GRANTING WRIT

The decision below is plainly a correct application of this Court's decisions in *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427,

and in *Alstate Construction Co. v. Durkin*, 345 U.S. 13. The claimed conflict with earlier decisions of other Courts of Appeals, on which petitioners rely, pre-dated this Court's Vollmer decision which, we submit, effectively resolved such conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Horace R. Alexius, Jr.
P. O. Box 142
Covington, Louisiana

OF COUNSEL:

Gordon Goodbee
Covington, Louisiana

McDougall & Rodrigue
Covington, Louisiana

CERTIFICATE

I hereby certify that I have this ____ day of ____, 1957, served copies of the foregoing brief on counsel for petitioners.

_____

Horace R. Alexius, Jr.